COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1278

ABBOTT L. REEVE, trustee,[1] & another[2]

vs.

CITY OF BEVERLY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, Abbott L. Reeve and J. Stanley Reeve, as trustees of the Folly Hill Associates Trust (the trust), appeal from a judgment dismissing their complaint for breach of contract and declaratory judgment against the city of Beverly (the city). The plaintiffs alleged that the city breached a contract by changing its zoning ordinances, and they also sought a declaratory judgment to that effect (counts one and two). The plaintiffs further sought another declaratory judgment that certain property was subject to an eight-year zoning freeze (count three). We conclude that the plain language of the contract is unambiguous, the Superior Court properly excluded parol evidence, and nothing in the contract prohibited the city

[1] Of the Folly Hill Associates Trust.

[2] J. Stanley Reeve, as trustee of the Folly Hill Associates Trust.

from changing its zoning ordinances. Further concluding that there is no actual controversy regarding the plaintiffs' request for declaratory relief based on the application of the eight-year zoning freeze under G. L. c. 40A, § 6, we affirm.

1. Standard of review. "We review a ruling on a motion to dismiss de novo, taking the complaint's allegations as true, as well as all reasonable inferences drawn in the plaintiff's favor" (citation omitted). Cournoyer v. Department of State Police, 93 Mass. App. Ct. 90, 90-91 (2018). The plaintiff must provide factual allegations sufficient to raise a right to relief that are above mere speculation. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). Although our evaluation of a motion to dismiss is generally controlled by the allegations within the complaint, "items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." Reliance Ins. Co. v. Boston, 71 Mass. App. Ct. 550, 555 (2008), quoting Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). See Coghlin Elec. Contrs., Inc. v. Gilbane Bldg. Co., 472 Mass. 549, 552 n.5 (2015) (consideration of allegations in pleadings and contracts referenced in pleadings did not convert motion to dismiss into motion for summary judgment). "We do not, however, accept or set forth 'legal conclusions [in the complaint] cast in the form of factual

allegations.'" Eigerman v. Putnam Invs., Inc., 450 Mass. 281, 282 (2007), quoting Schaer, supra.

2. Exclusion of parol evidence. The interpretation of a contract is a question of law, separate from the factual allegations that the court accepts as true. See Eigerman, 450 Mass. at 286-287. "When the words of a contract are clear, they must be construed in their usual and ordinary sense, and we do not admit parol evidence to create an ambiguity when the plain language is unambiguous." MacDonald v. Jenzabar, Inc., 92 Mass. App. Ct. 630, 634 (2018), quoting General Convention of the New Jerusalem in the U.S. of Am., Inc. v. MacKenzie, 449 Mass. 832, 835-836 (2007). Accord Siebe, Inc. v. Louis M. Gerson Co., 74 Mass. App. Ct. 544, 550 (2009), quoting Samos v. 43 East Realty Corp., 811 A.2d 642, 643 (R.I. 2002) ("when a contract is clear and unambiguous, the parol evidence rule bars admission of extrinsic evidence 'that would purport to contradict or modify the express terms of the written contract'"). Here, the judge properly concluded that the contract between the parties is unambiguous and thus the plaintiffs could not use parol evidence to circumvent them.

The city originally agreed to provide water and sewer facilities for a development project, and the landowner promised to pay the city $250,000 in installments expected to last well beyond the end of construction. In a 1982 amendment to the

agreement, the parties changed the payment amount and payment schedule and agreed that this obligation (and, strictly speaking, the city's obligation to provide further water and sewer facilities) would be terminated if the city amended its zoning ordinances in a manner that affected the development. Again, the agreement contemplated that the payment schedule would extend well beyond the end of construction. There is simply no place in the amended contract in which the city agreed not to change its zoning ordinances; in fact, the contract as amended specifically contemplated the possibility that the city might do so and excused the trust from further payment in that eventuality.[3]

As the amended contract is unambiguous, the judge properly declined to consider any extrinsic evidence about its meaning. See General Convention of New Jerusalem in the U.S. of Am., Inc., 449 Mass. at 836 ("extrinsic evidence cannot be used to contradict or change the written terms, but only to remove or explain the existing uncertainty or ambiguity"); Eastern Holding Corp. v. Congress Fin. Corp., 74 Mass. App. Ct. 737, 742 n.5 (2009) ("without any contract language lending support for these assertions, the affidavit is no more than an attempt to

[3] Indeed, as the judge recognized, a municipality may not bargain away its police powers, in any event. See Durand v. IDC Bellingham, LLC, 440 Mass. 45, 53 n.15 (2003).

introduce ambiguity into the parties' contract by contradicting their plain terms"). Similarly, because the amended contract contains no prohibition against, or other limitation on, the city's authority to change its zoning ordinances, the judge properly dismissed counts one and two. See Biewald v. Seven Ten Storage Software, Inc., 94 Mass. App. Ct. 376, 380 (2018), quoting General Convention of the New Jerusalem in the U.S. of Am., Inc., supra at 835 ("When the words of a contract are clear, they must be construed in their usual and ordinary sense").

3. Declaratory judgment on zoning freeze. General Laws c. 40A, § 6, provides for an eight-year zoning freeze if a preliminary plan followed within seven months by a definitive plan is submitted to a planning board for approval.[4] Here, the plaintiffs argue that, by filing the definitive plan within seven months after it filed the preliminary plan, the trust ensured that the development is entitled to the eight-year zoning freeze. The development, therefore, would be subject to the zoning requirements that existed in 2016 when the

[4] "[T]he land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval." G. L. c. 40A, § 6.

preliminary plan was filed. In its motion to dismiss and on appeal,[5] the city conceded this point. Accordingly, there is no controversy on this point between the parties. See Commissioners of the Bristol County Mosquito Control Dist. v. State Reclamation & Mosquito Control Bd., 466 Mass. 523, 534 (2013), quoting Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538 (2012) ("[D]eclaratory relief is reserved for real controversies and is not a vehicle for resolving abstract, hypothetical, or otherwise moot questions"). Although it is unsettling that the city took a contrary position in the Land Court, that filing was not pleaded here, and there was, in any event, no longer a controversy at the time of the dismissal. Accordingly, the judge properly dismissed count three.

Judgment affirmed.

By the Court (Green, C.J., Sullivan & Ditkoff, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: July 24, 2019.

[5] The city expressly acknowledged during oral argument that the eight-year zoning freeze applies to the development.

[6] The panelists are listed in order of seniority.